Office - Supreme Cou
F I L E D

No. 884

IN THE

Supreme Court of the United States

OCTOBER TERM, 1939

STATE OF OHIO, EX REL. [illegible]

Petitioner,

vs.

PAUL J. PRICE, CHIEF, DAYTON POLICE DEPARTMENT,

Respondent.

STATE OF OHIO, EX REL. [illegible]

Petitioner,

vs.

PAUL J. PRICE, CHIEF, DAYTON POLICE DEPARTMENT,

Respondent.

JOINT PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO.

JOSEPH W. BRANCH,
Counsel for Petitioners.

MIDWEST LAW PRINTING AND PUBLISHING CO., CINCINNATI, OHIO

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

STATE OF OHIO, EX REL. EDWARD W. FOCKE,
Petitioner,

vs.

PAUL J. PRICE, CHIEF, DAYTON POLICE DEPARTMENT,
Respondent.

STATE OF OHIO, EX REL. OTTERBEIN CREAGER,
Petitioner,

vs.

PAUL J. PRICE, CHIEF, DAYTON POLICE DEPARTMENT,
Respondent.

JOINT PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO.

Edward W. Focke and Otterbein Creager, petitioners, jointly pray that a writ of certiorari issue to review the judgment of the Supreme Court of the state of Ohio, en-

tered in the above entitled cases on June 6, 1956, rehearing denied, July 5, 1956.

CITATION TO OPINIONS BELOW.

The opinion of the Ohio Supreme Court is officially reported in 165 Ohio State Reports, p. 340. Rehearing denied, 165 O. S. 110. The opinions of the Court of Appeals of Montgomery county, Ohio, are unreported and printed in Appendix A herein.

JURISDICTION.

The judgment of the Ohio Supreme Court was entered on June 6, 1956, rehearing denied without opinion, July 5, 1956. The jurisdiction of this court is invoked under 28 U. S. Code, Section 1257 (2-3).

QUESTIONS PRESENTED.

I. Whether there is lack of due process and a violation of immunity from unreasonable arrest upon warrants issued without determination of probable cause, secured to citizens of the United States by Amendment Four of United States Constitution, and extended to states by Amendment Fourteen, Section 1, when a deputy clerk of a municipal court issues warrants of arrest as a ministerial act without determination of probable cause therefor, upon the filing of one affidavit with her charging a misdemeanor, namely, a violation of a municipal ordinance imposing a city income tax.

II. Whether persons arrested on such warrants have an adequate remedy at law by way of appeal, which precludes them from resorting to habeas corpus.

STATUTES INVOLVED.

The statutes involved are Sections 1901.31, 2725.01, 2725.06, 2935.10 and 2935.11 of Revised Code of Ohio.

STATEMENT.

Petitioner Focke was arrested upon a warrant of arrest issued May 10, 1955, by an appointed deputy clerk of the Municipal Court of Dayton (whose duties are prescribed by Ohio Revised Code Sec. 1901.31 (H) (see also Ohio Constitution Art. IV, Sec. 10)), without determination of reasonable ground to believe the offense charged had been committed (see R. C. Secs. 2935.10 and 2935.11), and solely because an affidavit charging the offense was filed with her. When arraigned, Focke refused to plead or enter appearance in that court (filing motion to quash for lack of due process, appearing expressly for the purpose alone of disputing jurisdiction, which motion is held in Ohio not to concede jurisdiction nor to enter appearance). Upon denial of motion, he applied directly to the Court of Appeals for habeas corpus, which court is given original jurisdiction in habeas corpus by Ohio Constitution Art. IV, Sec. 6. (See also Ohio Constitution Art. I, Sec. 8.) His petition for habeas corpus, filed May 26, 1955, alleges that said deputy was without statutory authority to issue such warrants; that there was lack of due process, and a violation of his right of security under Ohio Constitution Art. I, Secs. 14 and 16, and the U. S. Constitution, Amendments 4 and 14 (1).

Petitioner Creager was arrested June 8, 1955, upon a similar warrant issued by said deputy clerk in like manner. He applied directly to the Court of Appeals for

habeas corpus, not waiting for arraignment below. His petition alleges the same grounds for habeas corpus and similar facts. The Court of Appeals accepted jurisdiction in both cases, issued alternative writ for Price as arresting officer; upon his return of writ admitting his custody under said warrants, it heard the matter on briefs and oral arguments, and on November 17, 1955, filed an opinion refusing the relief on the ground that said deputy has authority under Revised Code 2935.11 to issue such warrants as a ministerial act, citing *Hornack v. State,* 39 Ohio Appellate Reports, 203, and *State, ex rel. Goodman, v. Redding,* 87 Ohio State 388. Relators duly filed, November 25, 1955, application for rehearing, reiterating the state and federal constitutional violations. Said court refused rehearing, January 4, 1956, in opinion citing *State v. Gutella,* 59 Ohio L. Abstract 289, which had held an affidavit and warrant for arrest sufficient if the affidavit contained the affiant's belief that he had reasonable grounds. Relators duly appealed as of right on constitutional grounds to the Ohio Supreme Court, January 26, 1956. Said court is the highest tribunal in the state to which they can appeal. Said court on June 5, 1956, affirmed the Court of Appeals, on the authority of *Yutze v. Copelan, Chief of Police,* 109 Ohio State Reports 171, where a person arrested, tried, found guilty, and fined, for violating a municipal (garbage) ordinance, invoked jurisdiction of Common Pleas Court for habeas corpus *contending the ordinance was unconstitutional and void.* That court dismissed his application, holding the remedy by habeas corpus was proper, but the ordinance was constitutional and valid. The Court of Appeals affirmed that the ordinance was valid, but stating that "habeas corpus will not issue to test the constitutionality of an ordinance after conviction and

before review." The Ohio Supreme Court affirmed, deciding the plaintiff in error had pursued the wrong remedy. Your petitioners duly petitioned for a rehearing, reiterating their state and federal constitutional contentions and pointing out that they had not raised an issue of constitutionality of the ordinance itself, but only of the lack of due process in their arrest. The rehearing was denied without opinion, July 5, 1956. Petitioners filed notice of appeal to this court for certiorari, with proof of service, July 16, 1956.

REASONS FOR GRANTING THE WRIT.

The decision of the court below in the instant case is in conflict with general principles as applied to issuance of warrants, announced by this court in *Ex parte Burford*, 3 Cranch 447; *Bram v. U. S.*, 168 U. S. 532, 42 L. Ed. 568, 17 S. Ct. 183; *Hague v. C. I. O.*, 101 Fed. 2nd 774, cert. granted, 306 U. S. 624, modified, 307 U. S. 496; *Marron v. U. S.*, 275 U. S. 192, 197; *Sgro v. U. S.*, 287 U. S. 206, 210; *Weeks v. U. S.*, 232 U. S. 383, and others. See also *Instructions to U. S. Commissioners*, by Mr. Justice Bradley (1877), 3 Woods Reports 502, and *Blackstone's Commentaries* (by Chitty), Vol. 2, Book 4, Chapter 21, "Of Arrests," pp. 234, 235.

Clearly the questions are of importance sufficient to require a review by this court. They concern fundamental constitutional rights of millions of private citizens who under the authority of the judgment complained of will be exposed to risk of having their liberty taken away by anyone willing to swear to a charge, however fantastic, however unsupported by fact. It abdicates the jurisdiction and power of courts and reduces the law courts and

court officials to mere servants of any affiant, powerless to stop unreasonable arrests. It makes Ohio even lower than a "police state," where at least arrests are made at the will of public officials, not of anyone.

CONCLUSION.

For the foregoing reasons this petition for a writ of certiorari to the Ohio Supreme Court to send up the records in cases Nos. 34714 and 34715 on its docket, should be granted.

Respectfully submitted,

JOSEPH W. SHARTS,

Counsel for Petitioners.

APPENDIX A.

Opinions of the Court of Appeals.

STATE, EX REL. FOCKE, v. PRICE, ETC.

Opinion.

(Rendered on the 1st day of August, 1955.)

By the Court:

Submitted on demurrer of relator to the answer of respondent, and on motion of respondent for judgment on the pleadings.

The instrument filed by respondent and originally designated "Return of writ", which was stricken, and "Answer" substituted is in no sense an answer; it is drawn as a return of writ and is couched in the same language and has the same defects as the return of the writ in State, ex rel. Creager, v. Price, case No. 2350, decided this day. No other return of writ has been filed. We regard the instrument as a return of writ and the demurrer of relator as a motion to strike the writ for failure to comply with the requirements of paragraphs (A) and (B) of Section 2725.14, R. C. Motion to strike sustained.

The motion of respondent for judgment on the pleadings is not supported by the record, and is hereby overruled.

Respondent will be granted leave to file return of writ within ten days after an entry journalizing this opinion is filed.

Miller, P. J., Hornbeck and Wiseman, JJ., concur.

Opinion.

(Rendered on the 1st day of August, 1955.)

By the Court:

Submitted on motion of relator to strike the return of the writ, and on motion of respondent for judgment on the

pleadings, and on motion of relator to strike respondent's motion from the files.

Upon an examination of the return of the writ filed by respondent, it cannot be determined whether relator was or was not arrested, and is or is not restrained of his liberty. The return of the writ does not comply with the requirements of paragraphs (A) and (B) of Section 2724.14, R. C. Motion to strike return of writ is sustained.

Motion of respondent for judgment on the pleadings is not supported by the state of the record. Motion of relator to strike respondent's motion is sustained.

Respondent will be granted leave to file a return of writ within ten days after an entry journalizing this opinion is filed.

Miller, P. J., Hornbeck and Wiseman, JJ., concur.

Opinion.

(Rendered on the 20th day of September, 1955.)

By the Court:

Submitted on motion of relator for an order requiring respondent to make the return of writ definite and certain. The record does not lend support to the motion and it is hereby overruled.

The motion of respondent for judgment of dismissal on the pleadings is also overruled.

An entry may be drawn accordingly.

Miller, P. J., Hornbeck and Wiseman, JJ., concur.

Opinion.

STATE, EX REL. CREAGER, V. PRICE, ETC.

(Rendered on the 20th day of September, 1955.)

By the Court:

Submitted on motion of relator for an order requiring respondent to make the return of the writ definite and

certain. The record does not lend support to the motion and it is hereby overruled.

An entry may be drawn accordingly.

Miller, P. J., Hornbeck and Wiseman, JJ., concur.

Opinion.

(Rendered on the 17th day of November, 1955.)

By the Court:

This is a companion case to No. 2348, which this day has been decided by this court. The writ will be denied, for the reasons indicated therein.

Miller, P. J., Hornbeck, J., and Collier, J., concur.

Opinion.

STATE, EX REL. FOCKE, V. PRICE, ETC.

(Rendered on the 17th day of November, 1955.)

Miller, J.:

This is an action in habeas corpus wherein the relator alleges that he is being unlawfully restrained of his liberty for the reason that the warrant upon which he was arrested was not issued in accordance with law.

The record reveals that the relator was arrested upon an affidavit sworn to by George Wartzbaugh, an investigator of the city income tax department for the city of Dayton, charging him with a misdemeanor under Section 13 of Ordinance No. 13922 in that he refused to permit a duly authorized agent of the superintendent of taxation of said city to examine the books, records and papers of the relator for the purpose of ascertaining whether or not there was any tax due; that said affidavit was sworn to before one V. Richards, a deputy clerk of the Municipal Court of said city, who thereupon issued a warrant for the arrest of the relator upon the filing of said affidavit in the Municipal Court.

The record reveals further that the relator is now being restrained of his liberty by virtue of the arrest under said warrant.

The question presented is whether the deputy clerk had authority to issue the warrant, or may such writ be issued only by the clerk of said court? R. C. 2935.10 provides:

> "Any judge or clerk of a court of record, or of any municipal court, or any magistrate, may issue process for the arrest of a person charged with an offense returnable in the court having jurisdiction thereof."

The power of the clerk is also defined in the Uniform Municipal Act, to-wit: R. C. 1901.31, Section (E):

> "The clerk of a municipal court should have * * * power to issue and sign all writs, process, subpoenas issuing out of the court * * *."

The duties of a deputy clerk of such court are defined by Section (H) of the above statute, to-wit:

> "* * * Each deputy clerk shall take an oath of office before entering upon the duties of his office, and when so qualified, may perform the duties appertaining to the office of the clerk. * * *."

The law defining when a warrant may issue is set forth in R. C. 2935.11, to-wit:

> "When an affidavit charging a person with the commission of an offense is filed with a judge, clerk, or magistrate, if he has reasonable ground to believe that the offense charged has been committed, he shall issue a warrant for the arrest of the accused."

Counsel for the relator urges that under Section 1901.31 of the Revised Code the clerk has the power to issue the warrant and that R. C. 2935.11 requires that in exercising such power he must determine if reasonable grounds exist to believe that the offense charged has been committed. It

is the contention of the relator that the power conferred upon the clerk requires an act of discretion which may not be delegated to a deputy. But we find that the Ohio authorities do not support the conclusion that such power is discretionary. It is said in 5 O. Jur. (2d), 27, Section 17, that the issuance of a warrant is a ministerial act, which may be compelled by mandamus. Citing Hornack v. State, 39 O. App., 203, 177 N. E., 244, and State, ex rel. Goodman, v. Redding, 87 O. St., 388, 101 N. E., 275. In the Hornack case, supra, the court held that even in the issuing of a search warrant a ministerial act is involved, and a finding of probable cause by a judge or magistrate is not required. It is interesting to note that the opinion in this case was written by Judge Weygandt, who stated on page 205:

> "Before commenting upon the wording of the newly-enacted statute in question, it should be noted that by the great weight of general authority the issuance of warrants, whether for search or for arrest, is regarded as a ministerial act. In 5 Ruling Case Law, 626, under the subject of 'Clerk of Courts', appears the following:
>
> 'The courts uniformly hold that the office of clerk of a court of justice is ministerial, and that it includes no judicial authority except by constitutional or legislative provision. There is some conflict of opinion as to the judicial or ministerial nature of certain specific duties of a clerk of court; but if his official duty is prescribed by law, then his action in performance of that duty is ministerial.'"

And at page 206:

> "'When an official duty does not belong inherently to the office itself, but may be devolved upon some other officer to perform, it is ministerial and its performance may be required by mandamus.
>
> The duty assigned by statute to a municipal court judge of issuing warrants, where the complaint and affidavits are sufficient, is ministerial and one which may be controlled by judicial power, and mandamus lies to compel the issuing of such warrants.'

> Then, too, in the Rosanski case, supra, the opinion contains the general statement that the issuance of warrants, whether for search or for arrest, is a ministerial act."

It should also be noted that R. C. 2935.10 provides that any clerk of a court of record, or municipal court, may issue process for the arrest of a person charged with an offense. The word "power" is not found in this section as in R. C. 1901.31, which relator relies upon. This section clearly indicates that no discretion is required to be exercised by the clerk for the issuing of a warrant, but that it is a duty imposed upon the clerk.

Relator cites the case of Nicholas v. Cleveland, 125 O. St., 474, but this case is not parallel with the case at bar for it involved a search warrant issued by a deputy clerk when the statute did not give such power to the clerk. G. C. 13430-3 then provided:

> "A warrant for search shall not be issued until there is filed with the judge or magistrate, an affidavit. * * *."

It will be noted that under this section no provision is made for filing the affidavit with the clerk. In holding that the clerk has no power to issue the warrant, the court stated, at page 479: "The clerk is merely a ministerial officer; his function is to carry out the orders of the judge."

It therefore appears to this court that the arrest of the relator was lawful. When such facts appear a discharge from custody by a writ of habeas corpus can not be allowed. In re Burson, 152 O. St., 375:

> "Where a person restrained of his liberty is in custody of an officer under process issued by a court or magistrate, or by virtue of a judgment or order of a court of record, and the court or magistrate had jurisdiction to issue the process, render the judgment or make the order, a discharge from custody by the writ

> of habeas corpus will not be allowed. Such person has an adequate remedy at law by way of review on appeal."

See also R. C. 2725.05.

We are therefore of the opinion that the writ may not be allowed.

Hornbeck, J., and Collier, J., concur.

Opinion.

State, ex rel. Focke, v. Price, Etc.
State, ex rel. Creager, v. Price, Etc.)

(Rendered on the 4th day of January, 1956.)

By the Court:

This is an application for a rehearing in which it is urged that the warrant for the arrest of the relator was issued in violation of his constitutional rights as set forth in Article I, Section 14, of the Ohio Constitution, and the Fourteenth Amendment to the federal Constitution.

As stated previously, we are of the opinion that the filing of the affidavit constituted "probable cause" for the issuing of the warrant for arrest under the provisions of R. C. 2935.11; that when such an affidavit is properly filed, the action of the clerk in issuing the same is ministerial and not judicial in nature. In State v. Gutilla, 59 O. L. Abs., 289, this court held in Syllabus 1:

> "An affidavit which states that the affiant has reasonable grounds to believe that an offense has been committed is sufficient to require the issuance of a warrant under Section 13432-9 GC."

Therefore, there has been no infringement of any rights guaranteed to the relator by either the state or federal Constitutions.

The application is denied.

Miller, P. J., Hornbeck, J., and Collier, J., concur.

APPENDIX B.

STATE, EX REL. FOCKE, APPELLANT, v. PRICE, APPELLEE.

Journal Entry of Ohio Supreme Court.

(Dated June 6, 1956.)

This cause came on to be heard upon the transcript of the record of the Court of Appeals of Montgomery county, and was argued by counsel. On consideration whereof, it is ordered and adjudged by this court, that the judgment of said Court of Appeal be, and the same is hereby affirmed; and it appearing to the court that there were reasonable grounds for this appeal it is ordered that no penalty be assessed herein.

It is further ordered that the appellee recover from the appellant his costs herein expended taxed at $.....

Ordered, that a special mandate be sent to the Court of Appeals of Montgomery county, to carry this judgment into execution.

Journal Entry.

(Dated July 5, 1956.)

Upon consideration of the above application for rehearing, it is ordered by the court that rehearing be, and the same hereby is, denied.

APPENDIX C.

STATE, EX REL. CREAGER, APPELLANT, v. PRICE, APPELLEE.

Journal Entry of Ohio Supreme Court.

(Dated June 6, 1956.)

This cause came on to be heard upon the transcript of the record of the Court of Appeals of Montgomery county, and was argued by counsel. On consideration whereof, it

is ordered and adjudged by this court, that the judgment of said Court of Appeal be, and the same is hereby affirmed; and it appearing to the court that there were reasonable grounds for this appeal it is ordered that no penalty be assessed herein.

It is further ordered that the appellee recover from the appellant his costs herein expended taxed at $.....

Ordered, that a special mandate be sent to the Court of Appeals of Montgomery county, to carry this judgment into execution.

Journal Entry.

(Dated July 5, 1956.)

Upon consideration of the above application for rehearing, it is ordered by the court that rehearing be, and the same hereby is, denied.

APPENDIX D.

STATE, EX REL. FOCKE, APPELLANT, v. PRICE, APPELLEE.
STATE, EX REL. CREAGER, APPELLANT, v. PRICE, APPELLEE.

Opinion of the Supreme Court of Ohio.

Appellants, Focke and Creager, residents of the city of Dayton, were arrested by the Dayton police upon affidavits sworn to before a deputy clerk of the Municipal Court of Dayton and warrants of arrest forthwith issued by such deputy clerk in the name of her superior, without a determination by a judge, clerk or magistrate of reasonable grounds to believe that the offenses charged had been committed. The offense charged in each case was a misdemeanor, namely, a violation of the city income tax ordinace, in that the appellant refused to permit an examination of his books and records.

Creager at once filed a petition in habeas corpus in the Court of Appeals.

When arraigned, Focke refused to plead or in any manner acknowledge jurisdiction of the court over his person, but filed a motion to quash for lack of due process. The Municipal Court overruled the motion. Focke then filed a petition in habeas corpus in the Court of Appeals.

Appellants contended that the deputy clerk of the Municipal Court was without statutory authority to issue the warrants for arrest without a determination by a judge, clerk or magistrate of reasonable grounds to believe that the offenses charged had been committed, and that their issuance was in violation of appellants' constitutional rights to due process and to be secure from unreasonable search without probable cause.

The Court of Appeals denied the relief sought in each case.

Appeals as of right bring both causes to this court for review.

Per Curiam. The appellants have an adequate remedy at law by way of appeal. The judgments of the Court of Appeals are hereby affirmed on authority of *Yutze v. Copelan, Chief of Police*, 109 Ohio St., 171, 142 N. E., 33, 32 A. L. R., 1048.

Judgments affirmed.

Weygandt, C. J., Matthias, Hart, Zimmerman, Stewart, Bell and Taft, JJ., concur.

APPENDIX E.

Statutes Involved.

Ohio Revised Code, Section 1901.31.

The clerk and deputy clerks of a municipal court shall be selected, compensated, give bond, and have powers and duties as follows:

(A) There shall be a clerk of the court appointed or elected as follows:

(1) If the population of the territory exceeds one hundred thousand at the regular municipal election next preceding the expiration of the term of the present clerk, a clerk shall be nominated and elected by the qualified electors of the territory in the manner provided for the nomination and election of judges in section 1901.07 of the Revised Code.

The clerk so elected shall hold office for a term of six years, which term shall commence on the first day of January next after his election, and until his successor is elected and qualified. In the Cincinnati municipal court, the clerk of courts of Hamilton county shall be the clerk of the municipal court, and may appoint an assistant clerk who shall receive such compensation, not less than two thousand dollars per annum, payable out of the treasury of Hamilton county in semimonthly installments, as the board of county commissioners prescribes, and such other compensation, not less than twenty-five hundred dollars per annum, payable in semimonthly installments out of the city treasury, as the legislative authority prescribes.

(2) If the population of the territory is less than one hundred thousand, the clerk shall be appointed by the court, and said clerk shall hold office until his successor is appointed and qualified, except that in the Lorain, Alliance, and Massillon municipal courts the clerk shall be elected.

During the temporary absence of the clerk due to illness, vacation, or other proper cause, the court may appoint a temporary clerk who shall be paid the same compensation and have the same authority and perform the same duties as the clerk.

(B) When a vacancy in the office of the clerk of a municipal court, except the Cincinnati municipal court, occurs in a territory where the population exceeds one hundred thousand, the court shall appoint a clerk who shall serve until his successor is elected and qualified. A successor shall be elected to fill the office for the unexpired term at the first municipal election held more than one hundred twenty days after the vacancy has occurred.

(C) In territories having a population of less than one hundred thousand, the clerk of a municipal court shall receive such annual compensation as the legislative authority prescribes; in territories having a population of one hundred thousand or more, except in Cincinnati municipal court, the clerk shall receive annual compensation in a sum equal to eighty-five per cent of the salary of a judge of such court. Such compensation is payable in semimonthly installments from the same sources and in the same manner as provided in section 1901.11 of the Revised Code.

The clerk's compensation shall not exceed that of the clerk of courts of the county in which the municipal court is located.

(D) Before entering upon the duties of his office, the clerk of a municipal court shall give bond of not less than six thousand dollars to be determined by the judges of the court conditioned upon the faithful performance of his duties as clerk.

(E) The clerk of a municipal court shall have general powers to administer oaths, take affidavits, and issue exe-

cutions upon any judgment rendered in the municipal court, including a judgment for unpaid costs, power to issue and sign all writs, process, subpoenas, and papers issuing out of the court, and to attach the seal of the court thereto, and, power to approve all bonds, sureties, recognizances, and undertakings fixed by any judge of the court or by law. He shall file and safely keep all journals, records, books, and papers belonging or appertaining to the court, record its proceedings, and perform all other duties which the judges of the court may prescribe, and keep a book showing all receipts and disbursements, which shall be open for public inspection at all times.

The clerk shall prepare and maintain a general index, a docket, and such other records as the court, by rule, requires, all of which shall be the public records of the court. In such docket he shall enter, at the time of the commencement of an action, the names of the parties in full, the names of the counsel, and the nature of the proceedings. Under proper dates, he shall note the filing of the petition, issuing of summons or other process, returns, and pleadings subsequent thereto. He shall also enter all reports, verdicts, orders, judgments, and proceedings of the court clearly specifying the relief granted or orders made in each action. The court may order an extended record of any of the above to be made and entered, under the proper action heading, upon such docket at the request of any party to said case, the expense of which may be taxed as costs in the case or may be required to be prepaid by the party demanding the same, upon order of the court.

(F) The clerk of a municipal court shall receive and collect all costs, fees, fines, penalties, bail, and other moneys payable to the office or to any officer of the court and issue receipts therefor, and shall each month disburse the same to the proper persons or officers and take receipts

therefor, provided that fines received for violation of municipal ordinances shall be paid into the treasury of the municipal corporation whose ordinance was violated and to the county treasury all fines collected for the violation of state laws, subject to sections 3375.50 and 3375.53 of the Revised Code. Moneys deposited as security for costs shall be retained pending the litigation. He shall keep a separate account of all receipts and disbursements in civil and criminal cases, which shall be a permanent public record of the office, as required by the bureau of inspection and supervision of public offices, and on the expiration of his term such records shall be delivered to his successor. He shall have other powers and duties as are prescribed by rule or order of the court.

(G) All moneys paid into a municipal court shall be noted on the record of the case in which they are paid and shall be deposited in a state or national bank selected by the clerk. On the first Monday in January of each year the clerk shall make a list of the titles of all cases in the municipal court which were finally determined more than one year past in which there remains unclaimed in the possession of the clerk any funds, or any part of a deposit for security of costs not consumed by the costs in the case. The clerk shall give notice of the same to the parties entitled to said moneys or to their attorneys of record. All such moneys remaining unclaimed on the first day of April of each year shall be paid by the clerk to the city treasurer. Any part of such moneys shall be paid by such treasurer at any time to the person having the right thereo, upon proper certification of the clerk.

(H) Deputy clerks may be appointed by the clerk and shall receive such compensation payable in semimonthly installments out of the city treasury as the clerk may prescribe. Each deputy clerk shall take an oath of office

before entering upon the duties of his office, and when so qualified, may perform the duties appertaining to the office of the clerk. The clerk may require any of the deputy clerks to give bond of not less than three thousand dollars, conditioned for the faithful performance of his duties.

The clerk or a deputy clerk shall be in attendance at all sessions of the court, although not necessarily in the court-room, and may administer oaths to witnesses and jurors and receive verdicts.

Ohio Revised Code, Section 2725.01.

Whoever is unlawfully restrained of his liberty, or entitled to the custody of another, of which custody such person is unlawfully deprived, may prosecute a writ of habeas corpus, to inquire into the cause of such imprisonment, restraint, or deprivation.

Ohio Revised Code, Section 2725.06.

When a petition for a writ of habeas corpus is presented, if it appears that the writ ought to issue, a court or judge authorized to grant the writ must grant it forthwith.

Revised Code of Ohio, Section 2935.10.

Any judge or clerk of a court of record, or of any municipal court, or any magistrate, may issue process for the arrest of a person charged with an offense returnable in the court having jurisdiction thereof.

Ohio Revised Code, Section 2935.11.

When an affidavit charging a person with the commission of an offense is filed with a judge, clerk, or magistrate, if he has reasonable ground to believe that the offense charged has been committed, he shall issue a warrant for the arrest of the accused. If the offense charged is a violation of the laws of the state, such warrant may be directed to and executed by any officer named in section 2935.03 of the Revised Code. If the offense charged is a violation of the ordinance or regulation of a municipal corporation, such process shall be directed to and executed by the officers of such municipal corporation.

FILED
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JOHN T. FEY, C

No. 384

In The

United States Supreme Court

October Term, 1956.

STATE OF OHIO, EX REL. EDWARD W. FOCKE,
Petitioner,

vs.

PAUL J. PRICE, CHIEF, DAYTON POLICE DEPARTMENT,
Respondent.

STATE OF OHIO, EX REL. OTTERBEIN CREAGER,
Petitioner,

vs.

PAUL J. PRICE, CHIEF, DAYTON POLICE DEPARTMENT,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO MOTION FOR A WRIT OF CERTIORARI

HERBERT S. KEANE,
Law Director.
ARTHUR O. FISHER,
Assistant City Attorney.
WILLIAM P. KEANE,
City Prosecutor.
Municipal Bldg.,
Dayton 2, Ohio.

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1956.

No. 384

STATE OF OHIO, EX REL. EDWARD W. FOCKE,
Petitioner,

vs.

PAUL J. PRICE, CHIEF, DAYTON POLICE DEPARTMENT,
Respondent.

STATE OF OHIO, EX REL. OTTERBEIN CREAGER,
Petitioner,

vs.

PAUL J. PRICE, CHIEF, DAYTON POLICE DEPARTMENT,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO MOTION FOR A WRIT OF CERTIORARI

INITIATED ORDINANCE 16922

Section 13. Violations; Penalties. Any person, firm or corporation subject to the provisions of this ordinance who shall wilfully fail, neglect or refuse to make any return or declaration, or any employer who shall wilfully fail, neglect

or refuse to deduct, withhold and pay the taxes imposed by this ordinance and as required by Section 5 hereof, or any taxpayer who shall wilfully refuse to pay the tax, penalties and interest imposed by this ordinance, or any person who shall refuse to permit the Superintendent of Taxation, or any duly authorized agent or employee, to examine his books, records and papers, or who shall knowingly make any incomplete, false or fraudulent return or declaration of estimated tax, shall be guilty of a misdemeanor and shall be fined not more than One Hundred Dollars ($100.00) for the first offense, and shall be fined not more than Five Hundred Dollars ($500.00) or imprisoned not more than sixty (60) days, or both, for any subsequent offense. The failure of any employer or taxpayer to receive or procure a return or declaration form shall not excuse him from making a return or declaration or from paying the tax imposed by this ordinance.

STATEMENT OF FACTS AND OPINIONS RENDERED IN STATE COURTS

Petitioners Focke and Creager were arrested upon warrants issued by a duly qualified, appointed and acting deputy clerk of the Municipal Court of Dayton, Ohio.

Petitioner Focke seasonably filed his motion to quash the affidavit and warrant and appeared in Dayton Municipal Court only for that purpose. The motion to quash was denied by Emmett J. Jackson, Judge, Dayton Municipal Court.

When the motion to quash was denied Mr. Focke applied to the Court of Appeals of this district for a writ of habeas corpus. Under the Ohio Constitution the Court of Appeals is one of the Courts that has original jurisdiction in Habeas Corpus cases.

Petitioner Creager, after warrant served, and before arraignment in the Dayton Municipal Court applied directly to the Court of Appeals for a writ of habeas corpus.

Both cases were submitted to the Court of Appeals of this district on briefs and oral argument. On November 17, 1955, the Court of Appeals denied the writ and rendered the following opinion.

MILLER, J.:

"This is an action in habeas corpus wherein the relator alleges that he is being unlawfully restrained of his liberty for the reason that the warrant upon which he was arrested was not issued in accordance with law.

"The record reveals that the relator was arrested upon an affidavit sworn to by George Wartzbaugh, an investigator of the City Income Tax Department for the City of Dayton, charging him with a misdemeanor under Section 13 of Ordinance No. 16922 in that he refused to permit a duly authorized agent of the Superintendent of Taxation of said City to examine the books, records and papers of the relator for the purpose of ascertaining whether or not there was any tax due; that said affidavit was sworn to before one V. Richards, a deputy clerk of the Municipal Court of said City, who thereupon issued a warrant for the arrest of the relator upon the filing of said affidavit in the Municipal Court.

"The record reveals further that the relator is now being restrained of his liberty by virtue of the arrest under said warrant.

"The question presented is whether the deputy clerk had authority to issue the warrant, or may such writ be issued only by the clerk of said court? R. C. 2935.10 provides:

> " 'Any judge or clerk of a court of record, or of any municipal court, or any magistrate, may issue process for the arrest of a person charged with an offense returnable in the court having jurisdiction thereof.'

"The power of the clerk is also defined in the Uniform Municipal Act, to-wit: R. C. 1901.31, Section (E):

> "'The clerk of a municipal court shall have * * * power to issue and sign all writs, process, subpoenas issuing out of the court * * *.'

"The duties of a deputy clerk of such court are defined by section (H) of the above statute, to-wit:

> "'* * * Each deputy clerk shall take an oath of office before entering upon the duties of his office, and when so qualified, may perform the duties appertaining to the office of the clerk. * * *.'

"The law defining when a warrant may issue is set forth in R. C. 2935.11, to-wit:

> "'When an affidavit charging a person with the commission of an offense is filed with a judge, clerk, or magistrate, if he has reasonable ground to believe that the offense charged has been committed, he shall issue a warrant for the arrest of the accused.'

"Counsel for the relator urges that under Section 1901.31 of the Revised Code the clerk has the *power* to issue the warrant and that R. C. 2935.11 requires that in exercising such *power* he must determine if reasonable grounds exist to believe that the offense charged has been committed. It is the contention of the relator that the power conferred upon the clerk requires an act of discretion which may not be delegated to a deputy. But we find that the Ohio authorities do not support the conclusion that such power is discretionary. It is said in 5 O. Jur. (2d) 27, Section 12, that the issuance of a warrant is a ministerial act, which may be compelled by mandamus. Citing Hornack v. State, 39 O. App. 203, 177 N. E. 244, and State ex rel. Goodman v. Redding, 87 O. St., 388, 101 N. E. 275. In the Hornack case, supra, the court held that

even in the issuing of a search warrant a ministerial act is involved, and a finding of probable cause by a judge or magistrate is not required. It is interesting to note that the opinion in this case was written by Judge Weygandt, who stated on page 205:

> " 'Before commenting upon the wording of the newly-enacted statute in question, it should be noted that by the great weight of general authority the issuance of warrants, whether for search or for arrest, is regarded as a ministerial act. In 5 Ruling Case Law, 626, under the subject of 'Clerks of Courts', appears the following:
>
> > " " 'The courts uniformly hold that the office of clerk of a court of justice is ministerial, and that it includes no judicial authority except by constitutional or legislative provision. There is some conflict of opinion as to the judicial or ministerial nature of certain specific duties of a clerk of court; but if his official duty is prescribed by law, then his action in performance of that duty is ministerial.' '

"And at page 206:

> > " " 'When an official duty does not belong inherently to the office itself, but may be devolved upon some other officer to perform, it is ministerial and its performance may be required by mandamus.
>
> > " " 'The duty assigned by statute to a municipal court judge of issuing warrants, where the complaint and affidavits are sufficient, is ministerial and one which may be controlled by judicial power, and mandamus lies to compel the issuing of such warrants.'
>
> " 'Then, too, in the Rosanski case, supra, the opinion contains the general statement that the issuance of warrants, whether for search or for arrest, is a ministerial act.'

"It should also be noted that R. C. 2935.10 provides that any clerk of a court of record, or municipal court, may issue process for the arrest of a person charged with an offense. The word 'power' is not found in this section as in R. C. 1901.31, which relator relies upon. This section clearly indicates that no discretion is required to be exercised by the clerk for the issuing of a warrant, but that it is a duty imposed upon the clerk.

"Relator cites the case of Nicholas v. Cleveland, 125 O. St., 474, but this case is not parallel with the case at bar for it involved a search warrant issued by a deputy clerk when the statute did not give such power to the clerk. G. C. 13430-3 then provided:

> " 'A warrant for search shall not be issued until there is filed with the judge or magistrate, an affidavit. * * *.'

"It will be noted that under this section no provision is made for filing the affidavit with the clerk. In holding that the clerk had no power to issue the warrant, the court stated, at page 479: 'The clerk is merely a ministerial officer; his function is to carry out the orders of the judge.'

"It therefore appears to this Court that the arrest of the relator was lawful. When such facts appear a discharge from custody by a writ of habeas corpus can not be allowed. In re Burson, 152 O. St., 375:

> " 'Where a person restrained of his liberty is in custody of an officer under process issued by a court or magistrate, or by virtue of a judgment or order of a court of record, and the court or magistrate had jurisdiction to issue the process, render the judgment or make the order, a discharge from custody by the writ of habeas corpus will not be allowed. Such person has an adequate remedy at law by way of review on appeal.'

"See also R. C. 2725.05.

"We are therefore of the opinion that the writ may not be allowed.

"HORNBECK, J., and COLLIER, J., of the Fourth District, sitting by designation, CONCUR."

On the same date (November 17, 1955) the Court of Appeals for the Second District of Ohio rendered the following opinion in State, ex rel Creager:

"By the Court:

"This is a companion case to No. 2348 (Focke Case) * which this day has been decided by this Court. The writ will be denied for the reasons indicated therein.

"Miller, P. J., Hornbeck, J. and Collier, J., concur."

Petitioners asked for a rehearing in the Court of Appeals of the Second Appellate District of Ohio and on January 4, 1956, the following opinion was rendered by that Court.

"By the Court:

"This is an application for a rehearing in which it is urged that the warrant for the arrest of the relator was issued in violation of his Constitutional rights as set forth in Article I, Section 14, of the Ohio Constitution, and the Fourteenth Amendment to the Federal Constitution.

"As stated previously, we are of the opinion that the filing of the affidavit constituted 'probable cause' for the issuing of the warrant for arrest under the provisions of R. C. 2935.11; that when such an affidavit is properly filed, the action of the Clerk in issuing the same is ministerial and not judicial in nature. In State v. Gutilla, 59 O. L. Abs., 289, this Court held in Syllabus 1:

> " 'An affidavit which states that the affiant has reasonable grounds to believe that an offense has been committed is sufficient to require the issuance of a warrant under Section 13432-9 OGC.'

*(Focke case) added.

"Therefore, there has been no infringement of any rights guaranteed to the relator by either the State or Federal Constitutions.

"The application is denied.

"MILLER, P. J., HORNBECK, J., and COLLIER, J. of the Fourth District, sitting by designation, CONCUR."

Appellants, Focke and Creager, appealed as of right to the Supreme Court of the State of Ohio. Briefs were submitted by counsel and the cases were submitted after oral argument on May 22, 1956.

On June 5, 1956, the Supreme Court of Ohio rendered the following opinion:

"Appeals from the Court of Appeals for Montgomery County.

"Appellants, Focke and Creager, residents of the City of Dayton, were arrested by the Dayton police upon affidavits sworn to before a deputy clerk of the Municipal Court of Dayton and warrants of arrest forthwith issued by such deputy clerk in the name of her superior, without a determination by a judge, clerk or magistrate of reasonable grounds to believe that the offense charged had been committed. The offense charged in each case was a misdemeanor, namely, a violation of the city income tax ordinance, in that the appellant refused to permit an examination of his books and records.

"Creager at once filed a petition in habeas corpus in the Court of Appeals.

"When arraigned, Focke refused to plead or in any manner acknowledge jurisdiction of the court over his person, but filed a motion to quash for lack of due process. The Municipal Court overruled the motion. Focke then filed a petition in habeas corpus in the Court of Appeals.

"Appellants contended that the deputy clerk of the Municipal Court was without statutory authority to issue the warrants for arrest without a determination

by a judge, clerk or magistrate of reasonable grounds to believe that the offenses charged had been committed, and that their issuance was in violation of appellants' constitutional rights to due process and to be secure from unreasonable search without probable cause.

"The Court of Appeals denied the relief sought in each case.

"Appeals as of right bring both causes to this court for review.

(Names of Counsel deleted.)

"*Per Curiam*: The appellants have an adequate remedy at law by way of appeal. The judgments of the Court of Appeals are affirmed on authority of Yutze v. Copelan, Chief of Police 109 Ohio St., 171, 142 N. E., 33, 32 A. L. R., 1048.

"Weygandt, C. J., Matthias, Hart, Zimmerman, Stewart, Bell and Taft, JJ., concur."

QUESTIONS RAISED BY PETITIONERS AND ANSWERS OF RESPONDENT

Question 1 Raised by Petitioners

Is there lack of due process and a violation of the Fourth Amendment of the United States Constitution as extended to the states by Section 1 of the Fourteenth Amendment when a deputy clerk of a municipal court issues warrants for arrest as a ministerial act without determination of probable cause therefor, upon the filing of an affidavit with said deputy charging a misdemeanor?

Answer to Question No. 1

The affidavit filed with the deputy clerk charges a misdemeanor under Section 13 of Ordinance 16922 of the City of Dayton, Ohio, in that appellants Focke and Creager

violated certain provisions of the City of Dayton Income Tax Ordinance.

The affidavits questioned were executed before one Virginia D. Richards, a Deputy Clerk of the Dayton Municipal Court. After the execution of the affidavit a warrant for the petitioner issued. In issuing the warrant the law of the State of Ohio was fully complied with.

The power of the Clerk of Courts is found, among other places, in Revised Code of Ohio Section 2935.10.

> *Sec. 2935.10 RC WHO MAY ISSUE WARRANTS.*
> Any judge or clerk of a court of record, or of any municipal court, or any magistrate, may issue process for the arrest of a person charged with an offense returnable in the court having jurisdiction thereof.

We find the power of the Clerk of Courts also spelled out in the Uniform Municipal Court Act in Section 1901.31 (E) Revised Code of Ohio.

> *Sec. 1901.31 (E) RC CLERK OF COURT*
> The clerk of a municipal court shall have general powers to administer oaths, take affidavits, * * * power to issue and sign all writs, process, subpoenas, and papers issuing out of the court, and to attach the seal of the court thereto.

We find the duties of a deputy clerk of such courts are set forth in section (H) of the above cited statute.

> *Sec. 1901.31 (H) RC DEPUTY CLERKS*
> Deputy clerks may be appointed by the clerk.
> Each deputy clerk shall take an oath of office before entering upon the duties of his office, and when so qualified, may perform the duties appertaining to the office of the clerk. * * *.

We also find it specifically stated in Section 3.06 Revised Code of Ohio that a deputy, when duly qualified,

may perform the duties of his principal. This section applies to deputy clerks of courts.

> *Sec. 3.06 RC DEPUTIES AND CLERKS*
> A deputy, when duly qualified, may perform any duties of his principal * * *.

There is no showing that the prosecution was not instituted as the code requires in misdemeanor cases.

> *Sec. 2941.35 RC PROSECUTIONS FOR MISDEMEANORS*
> Prosecutions for misdemeanors may be instituted by a prosecuting attorney by affidavit or such other method as is provided by law in such courts as have original jurisdiction in misdemeanors. * * *.

It is not disputed that an affidavit charging an offense was filed before warrant issued.

The judicial decisions of a public officer are those which are left to his own judgment and concerning which he may use his own discretion. Ministerial acts and duties are those concerning which he has no discretion and which he must perform in a particular way. A ministerial act is one which a person performs in a given situation, with stated facts and without regard to the exercise of judgment. The act of issuing a warrant is a ministerial act and not a judicial act.

(a) The great weight of authority holds that the issuance of a search warrant, or a warrant to arrest are ministerial acts. (5 RCL 626)

(b) The issuance of a warrant is a ministerial act * * * (3 Ohio Jurisprudence 150)

(c) Hornack v. Lakewood (10 Ohio Law Abstract 113) decided by our now Chief Justice while he was serving on the bench for the Eighth Appellate District in this state holds in branch 3 of the syllabus:

> 3. Such issuance is a ministerial act and does not require a preliminary finding of probable cause by a judge or magistrate.

(d) The cited branch of the Hornack case (supra) when read in connection with the paragraph from 5 Ruling Case Law (supra) leads to but one reasonable conclusion and that is that the issuance of a warrant for arrest is a purely ministerial act and does not require judicial inquiry.

(e) McGannon v. State (27 Ohio Circuit Courts 245) holds that the issuance of an arrest warrant * * * is ministerial and its performance may be required by mandamus. The DUTY assigned by statute * * * of issuing warrants where the complaint and affidavit are sufficient, is ministerial, and one which may be controlled by judicial process, and mandamus lies * * *. (Emphasis added)

We again cite our Ohio Statutes.

Sec. 2935.11 RC ISSUANCE OF WARRANT. When an affidavit charging a person with the commission of an offense is filed with a judge, clerk or magistrate, if he has reasonable ground to believe that the offense charged has been committed, he SHALL (IMPERATIVE) issue a warrant for the arrest of the accused. (Emphasis and "IMPERATIVE" added)

To constitute a ministerial act the duties must be so clear and specific that no element of discretion is left in their performance. It is the contention of the City of Dayton that when an affidavit is presented to the Clerk he has the function thereupon to examine the instrument and if it is found to allege a crime HE MUST issue (HE SHALL) issue the warrant. ISSUING THE WARRANT IS A DUTY, NOT THE EXERCISE OF A POWER.

Justice Marshall in the *Roskanski* v. *State* (106 OS 442) stated in 1922 that the practice had been uniform for more than half a century to require nothing more than the filing of an affidavit as the basis for the issuance of a warrant. We contend that the statutory requirement is fulfilled

when the affidavit filed charges the defendant with the commission of a crime, – that is all of the information – all of the formality required.

DUE PROCESS OF LAW

Due process of law is hard to define exactly. It has been held to mean that arbitrary action is prohibited. In *Stewart* v. *Polk County* (1 Amer. Rep. 238) due process of law has been held to mean "judicial proceedings in Court."

Any law which affords a hearing before it condemns, and renders judgment only after trial is not in violation of the constitutional provisions that no citizen shall be deprived of life, liberty, or property without due process of law.

> (Extracted from *Insurance Company* v. *Chowning*, 26 SW 982)

Any system of judicial procedure that does not violate the law of the land does not contravene due process. It has been said that due process of law involves the essential right of notice, hearing, and opportunity to be heard before a competent tribunal.

In the two cases before this Court, prosecution was instituted and has proceeded according to the law of the State of Ohio. Statutory law has been fully complied with. That is all that is required by due process.

PROBABLE CAUSE

The prohibitions in The Fourth Amendment to the Constitution of the United States are directed exclusively against the activities of the Federal Government and have no application to the State of Ohio or any of its agencies.

(*State of Ohio* v. *Lindway*, 131 O.S. 166) Ohio Statutes do not require that an inquiry be made for probable cause before a warrant for arrest issue. No preliminary finding of probable cause by a judge or magistrate is required.

Ohio requires reasonable grounds only for the issuance of a warrant.

> *Sec. 2935.11 RC ISSUANCE OF WARRANT*
> When an affidavit charging a person with the commission of an offense is filed with a judge, clerk, or magistrate, if he has reasonable ground to believe that the offense charged has been committed, he shall issue a warrant for the arrest of the accused.

Probable cause is synonymous with reasonable cause. (*Stacy* v. *Emery*, 97 US 642 at 645)

If the facts and circumstances before the officer are such as to warrant a man of prudence and caution in believing that the offense has been committed it is sufficient. (*Stacey* v. *Emery*, 97 US at 645)

An affidavit which states that the affiant has reasonable grounds to believe that an offense has been committed is sufficient to *require* the issuance of a warrant. (*State* v. *Gutilla*, 47 OO 251) Emphasis added.

Question No. 2 Raised by Petitioners

Do the petitioners have an adequate remedy at law by way of appeal, which precludes them from resorting to habeas corpus?

Answer to Question No. 2

The petitioners have an adequate remedy at law by way of appeal in these cases, but, have elected to make a collateral and indirect attack in the case rather than resort to the proper method of trial and appeal.

The great weight of authority, we believe, holds that habeas corpus is not the proper remedy to review error, either of fact or law, and that a criminal court is empowered to determine in the first instance the question whether or not an ordinance and statute is violation of an organic law, and that if error intervenes in the decision the defendant has a right to review in the appellate courts where the constitution question may again be raised. This is the sensible rule, and were it not so the writ could be invoked even after conviction and appeal and after the constitutional question had been fully heard and determined in the trial and appellate courts. This would result in interminable delay and confusion albeit no useful purpose would be served.

In petitioner Focke's case the trial court overruled the motion to quash for lack of due process. Instead of the adequate, available, and recognized route of trial and appeal the accused elected to seek the collateral remedy of habeas corpus. In doing so he elected to circumvent and by-pass the remedy available to him and seek relief by prerogative writ.

The law of Ohio conforms to what we consider to be the weight of authority. In *Yutze* v. *Copelan, Chief of Police* (109 O.S. 171) cited by our Supreme Court of Ohio in refusing the writ we find that *habeas corpus will not lie to test the constitutionality of a statute or of an ordinance.*

We are compelled to conclude that the decisions of this court are to the same effect.

In *Ex parte Royall* (117 U.S. 241) Mr. Justice Harlan at page 250 said in the course of his opinion:

> "The question as to the constitutionality of the law under which he is indicted must necessarily arise at his trial under the indictment, and it is one upon which, as we have seen, it is competent for the state court to pass. * * * Nor do their circumstances, as

detailed in the petitions, suggest any reason why the state court of original jurisdiction may not, without interference upon the part of the courts of the United States, pass upon the question which is raised as to the constitutionality of the statutes under which the appellant is indicted."

In the later case of *Johnson* v. *Hoy* (227 U.S. 245) Mr. Justice Lamar used the following language:

> "The writ of habeas corpus is not intended to serve the office of a writ of error even after verdict, and, for still stronger reasons, it is not available to a defendant before tried, except in rare and exceptional cases * * *."

In the case *Henry* v. *Henkel* (235 U.S. 219) Mr. Justice Lamar stated in the course of his opinion at page 229:

> "* * * the court, with the exceptions named, has uniformly held that the hearing on habeas corpus is not in the nature of a writ of error nor is it intended as a substitute for the functions of the trial court."

The same rule was applied in *In re Gregory* (219 U.S. 210). In the course of his opinion Mr. Justice Holmes said:

> "The only question before us is whether the police court had jurisdiction. A habeas corpus proceedings cannot be made to perform the function of a writ of error."

From the cited decisions of this court and from the law of Ohio as stated in *Yutze* v. *Copelan* (109 O.S. 171) it can safely be concluded that the trial court affords a proper remedy for the petitioners in these cases and that by selection of habeas corpus the wrong remedy was pursued. Pursuit of an improper or a wrong remedy does not render the remedy of trial and appeal less adequate.

WHY WRIT SHOULD BE DENIED

The Courts of the State of Ohio are competent to decide whether the petitioner is or is not illegally restrained of his liberty. We feel that the appropriate time for the determination of these questions is at the trial of the charges filed against petitioners Focke and Creager, and that the detention of the petitioners (constructive detention only) for the sole purpose of securing attendance at the trial is not an improper exercise by a court of its power to hear and decide cases.

(*Ex parte Royall*, 117 U.S. 241)

In branch 2 of the syllabus in *Ex parte Royall* (117 U.S. 241) we find that it is a matter of discretion on the part of the Federal Courts whether or not the Court will exercise jurisdiction in habeas corpus.

> "When a person is in custody, under process from a state court of original jurisdiction, for an alleged offense against the laws of such State, and it is claimed that he is restrained of his liberty in violation of the Constitution of the United States, the Circuit Court of the United States has a discretion whether it will discharge him in advance of his trial in the court in which he is indicted; but this discretion should be subordinated to any special circumstances requiring immediate action. After conviction of the accused in the State Court, the Circuit Court has still a discretion whether he shall be put to his writ of error to the highest court of the State, or whether it will proceed by writ of habeas corpus summarily to determine whether he is restrained of his liberty in violation of the Constitution of the United States."

In *Robb* v. *Connolly*, 111 U.S. 624 at 637 we find "upon the State Courts, equally with the Courts of the Union rests the obligation to guard, enforce, and protect every

right granted or secured by the Constitution of the United States and the laws made in pursuance thereof, whenever these rights are involved in any suit or proceedings before them."

We are, of course, familiar with the holding in *Ex parte Siebold*, 100 U.S. 371 that an unconstitutional law is void, and is no law and that an offense created by it is not a crime. If the local statute under which warrant issued be repugnant to the Constitution, the prosecution under it has nothing upon which to rest, and the entire proceedings become a nullity.

However, the law of Ohio is that Habeas Corpus cannot be made a substitute for appeal, and petitioners are endeavoring in the *Focke* case to collaterally attack by Habeas Corpus the judgment of the Dayton Municipal Court finding that the affidavit filed was not subject to motions to quash instead of continuing the direct attack by appeal. In the *Creager* case the validity of the warrant was attacked by Habeas Corpus in the Court of Appeals of the Second Appellate District for Ohio and that Court, in the opinion set forth in this brief (at page 3) held that the statutes under which warrant issued was valid. The Supreme Court of Ohio affirmed the Appellate Court.

Petitioner Focke was once before in the Dayton Municipal Court on the same charge prior to the time the present case against him was filed. At that earlier date he invoked the original jurisdiction of the Court of Appeals for the Second Appellate District in an action in Habeas Corpus.

On January 26, 1955, the Ohio Court of Appeals in *State, ex rel Focke* v. *Kirkpatrick, Chief of Police*, sustained the City of Dayton's Motion to Dismiss on the Pleading and on the agreed Statement of Facts. The Court rendered the following opinion:

"By the Court:

"Submitted on motion of respondent to dismiss the petition for writ of habeas corpus. The relator invoked the original jurisdiction of this Court. The facts have been stipulated.

"The relator was arrested by the Police Department of the City of Dayton for a violation of an ordinance of said City. Relator filed the motion to quash, which was overruled. He is now awaiting trial in Municipal Court of Dayton. The stipulated facts do not show that relator is in custody; however, the petition alleges he is being restrained of his liberty by the Chief of Police, and it seems to be conceded by counsel that he is in technical custody.

"The relator contends that the warrant for arrest was improperly issued, which, if all that is claimed is true, would amount to an irregularity which would not deprive the court of jurisdiction and the question could be presented only on appeal.

"The principal ground for issuing the writ is the claim that the city ordinances, the violation of which the relator is charged with, is unconstitutional and void. It is well established in Ohio that the constitutionality of a statute or ordinance cannot be tested by a petition for a writ of habeas corpus. Yutze v. Copelan, 109 O. S. 171, 142 N. E. 33; Ex parte Elicker, 117 O. S. 500, 159 N. E. 478; Calhoun v. Russell, 154 O. S. 81, 93 N. E. (2d) 561; Hamlin v. State, 58 O. L. Abs. 274, 96 N. E. (2d) 426. In Yutze v. Copelan, supra, the syllabus is as follows:

> " 'A writ of habeas corpus will not lie, to test the constitutionality of a statute or ordinance, in favor of one who has been convicted, where the criminal court wherein conviction was obtained had jurisdiction or power to determine the question of constitutionality. In such case the writ cannot be made a substitute for proceedings in error.'

"Unquestionably the Municipal Court of Dayton had jurisdiction and power to determine the question of the constitutionality of the ordinance. That court has jurisdiction of the person and the subject matter. It is axiomatic that habeas corpus will lie only when the court exercising restraint is acting without jurisdiction. Vol. 20, O. Jur. page 429, Section 11. If the Court issuing the process, rendering the judgment, or making the order, had jurisdiction the writ of habeas corpus shall not be allowed. Section 2725.05, R.C.

"Motion to dismiss sustained.

"WISEMAN, P. J., MILLER and HORNBECK, J. J., concur."

CITATIONS BY PETITIONERS NOT DETERMINATIVE OF ANY QUESTIONS INVOLVED IN THESE CASES

We have carefully read and studied the brief of the petitioners and find no cases in point called to this Court's attention. We find that the cited cases concern themselves with search and seizure of evidence and with the admissibility of such evidence at trial. That question is not in issue in this case, and were it in issue the adjective law of Ohio as declared in *State of Ohio* v. *Lindway*, (131 O.S. 166) would be controlling on the Federal Courts.

Bram v. *United States* (168 U.S. 532) which covers the admissibility of confessions made by accused persons is not in any way controlling in this case.

The case *Marron* v. *United States*, (275 U.S. 192) cited by the petitioners covers *search warrants* and *search and seizure* and has no application to the facts in the cases before this court.

The matter of conviction by means of unlawful seizures and enforced confessions was raised in *Weeks* v. *United States* (232 U. S. 383) and has no application to the facts in the instant case before this court. In that case it was held that illegally secured evidence could not be used against an accused over his objections.

In *Ex parte Burford* (3 Cranch's Reports 448) we find no facts or law applicable to the case at bar.

CONCLUSION

Appellants are in constructive custody under process of a State Court in which they are charged with a criminal offense. Bail has not been required to guarantee the appearance of either accused at trial, and it cannot be alleged that a speedy trial without unnecessary delay will be denied either defendant. The question as to the constitutionality of the law by virtue of which the petitioners are before the Court must necessarily arise at trial and be passed upon, and is a question upon which it is competent for the State Courts of Ohio to pass.

We are of the opinion that while this Court has the power to do so, it is within the sound discretion of the Court whether the power to discharge the petitioners on application for writ of Habeas Corpus and before trial be exercised. Exercise of the power by this Court would in effect be to draw to itself the control of all criminal prosecutions commenced in all of the States in the Union whenever the accused alleges that he is illegally restrained of his liberty. The circumstances in this case do not suggest any reason why the State Court of original jurisdiction cannot pass on the validity of all ordinances and statutes ques-

tioned. This Court cannot presume that the decision of the State Courts would be otherwise than is required by the law of the land.

(*Ex parte Royall*, 117 U.S., 241)
(*Ex parte Royall*, No. 2, 117 U.S., 254)

Respectfully submitted,

HERBERT S. BEANE,
Law Director.
ARTHUR O. FISHER,
Assistant City Attorney.
WILLIAM P. KEANE,
City Prosecutor.

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No. 384.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

STATE OF OHIO, EX REL. EDWARD W. FOCKE,
Petitioner,

vs.

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Respondent.

STATE OF OHIO, EX REL. OTTERBEIN CREAGER,
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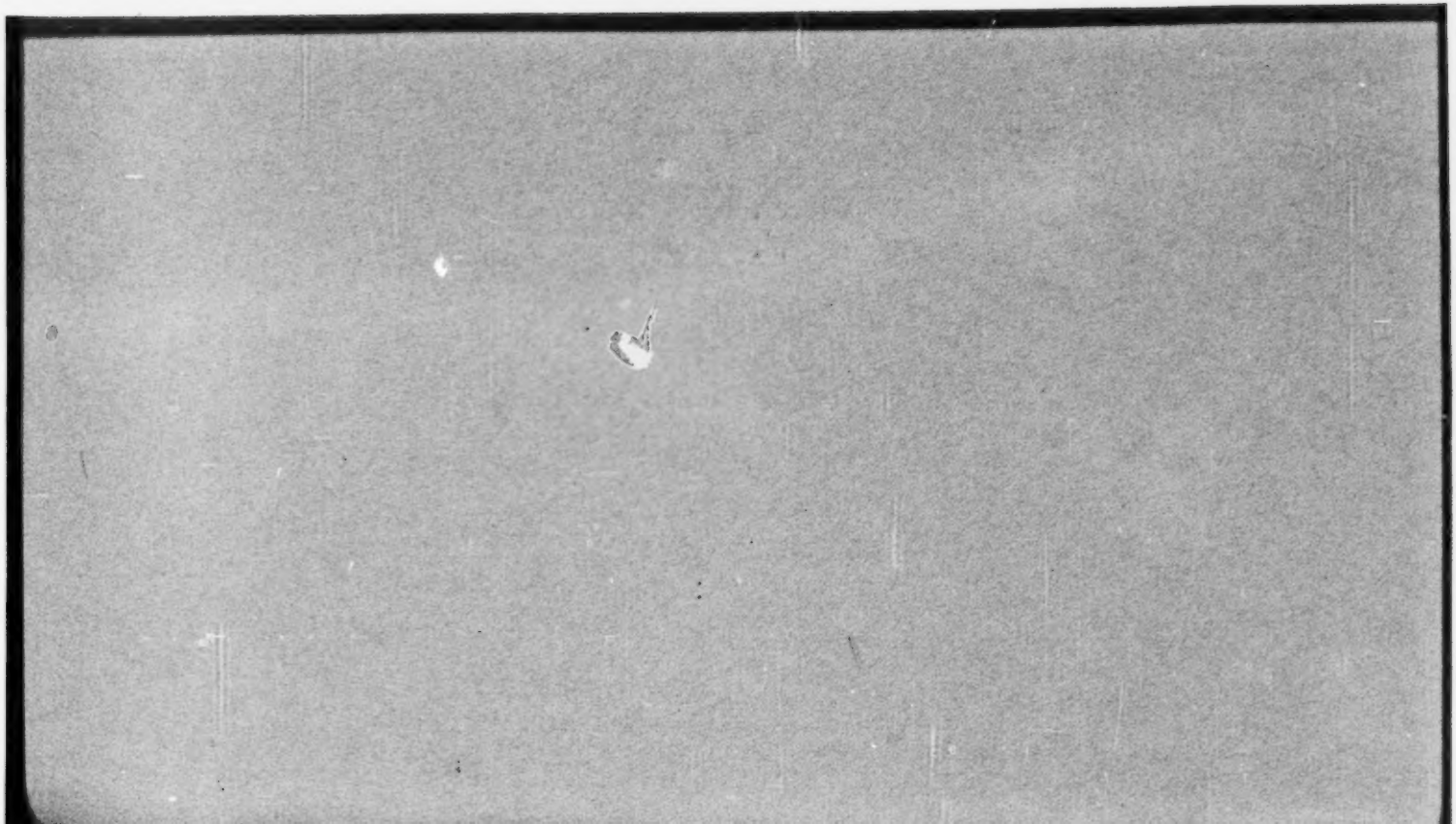
PETITIONERS' JOINT REPLY TO RESPONDENT'S BRIEF OPPOSING PETITION FOR CERTIORARI.

JOSEPH W. SHARTS,
527 W. Second St., Dayton 2, Ohio,
Counsel for Petitioners.

MIDWEST LAW PRINTERS AND PUBLISHERS, INC., Columbus 15, Ohio



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PETITIONERS' JOINT REPLY TO RESPONDENT'S BRIEF OPPOSING PETITION FOR CERTIORARI.

I.

REPLY TO RESPONDENT'S FIRST ANSWER.

Respondent contends that the issuance of warrants "fully complied with" state law, "does not violate the law of the land," and "is due process of law."

(A) But state law is controlled by the federal "privileges and immunities" imposed upon states by the 14th Amendment, United States Constitution:

U. S. v. Cruikshank, (1875) 92 U. S., 542 (Syl. 8);
Owensboro Waterworks Co. v. Owensboro, Ky., (1906) 26 S. Ct., 249, 200 U. S., 38, 50 L. Ed., 361;
Reagan v. Farmers' Loan etc. Co., (Tex. 1894) 14 S. Ct., 1047, 154 U. S., 390, 38 L. Ed., 1014;
Raymond v. Chicago Union Traction Co., (Ill. 1907) 28 S. Ct., 7, 207 U. S., 20, 52 L. Ed., 78, 12 Ann. Cas., 757;
Louisville etc. R. Co. v. Bosworth, (D. C. Ky., 1913) 209 Fed., 380;
Meyers v. Shields, (CC Ohio, 1894) 61 Fed., 713, 726.

(B) "Due process" required by the 14th Amendment is determined by federal standards, not by state:

Munn v. Illinois, (1876) 94 U. S., 113, at pp. 123, 124, 24 L. Ed., 77, affirming 69 Ill., 80:

> "By the 5th Amendment it was introduced into the Constitution * * * and by this amendment" (14th) "as a guaranty against any encroachment upon an acknowledged right of citizenship by the legislatures of the states."

Brinkerhoff etc. Co. v. Hill, (1930) 50 S. Ct., 451, 281 U. S., 673, 74 L. Ed., 1107, reversing 19 S. W. 2d, 746, 323 Mo., 180;
Southern Ry. Co. v. Commonwealth, (1933) 54 S. Ct., 147, 290 U. S., 190, 78 L. Ed., 260, reversing 167 S. E., 578, 177 Va., 779.

(C) Ohio law, as interpreted by the Ohio Supreme Court herein, holds issuance of warrants of arrest to be merely a ministerial act, but federal law holds that it requires *judicial* scrutiny to be in due process of law:

U. S. v. Borkowski, (D. C. Ohio, 1920) 268 Fed., 408:

> "* * * Otherwise the conclusion" (as to probable cause) "would be that of the witness and not of the judicial officer in whom alone the Constitution has

vested the extraordinary power to issue search warrants, and who is thus charged with the duty of preventing unreasonable searches and seizures."

Rose v. U. S., (CCA Neb., 1930) 45 Fed. 2d, 459, syl. 6.

Matter of Rule of Court (CC Ga., 1877) 3 Woods, U. S., 502:

(By Mr. Justice Bradley) "It is plain from this fundamental enunciation" (U. S. Constitution Amendment) "as well as from the books of authority on criminal matters in the common law that the probable cause referred to, and which must be supported by oath or affirmation, must be submitted to the committing magistrate himself, and not merely to the official accuser, so that he, the magistrate, may exercise his own judgment on the sufficiency of the ground shown for believing the accused person guilty, and this ground must amount to a probable cause of belief or suspicion of the party's guilt."

This allusion to the common law is corroborated by *Blackstone's Commentaries* (by (Chitty), Vol. 2, Book 4, Chapter 21, "Of Arrests," pp. 234, 235, where the history of process of arrest in England is traced back to Sir Edward Coke, showing how carefully English courts safeguarded the liberty of the subject against arbitrary arrest, by requiring advance judicial scrutiny before issuance of warrants.

This essential feature of "due process of law" crossed the Atlantic with American colonists, and is embodied in the 4th, 5th, and 14th Amendments of the U. S. Constitution as "the law of the land":

Murray v. Hoboken Land etc. Co., (N. Y., 1856) 18 How., 272, at 276-277:

(By Curtis, J.) "* * * it is not left to the legislative power to enact any process which might be devised. The article" (5th Amend.) "is a restraint on

> the legislative as well as on the executive and judicial power of the government."

Since the enactment of the 14th Amendment, this same restraint controls states:

> *Slaughterhouse Cases,* (La., 1873) 16 Wall., 73, 21 L. Ed., 394;
> *Elk v. Williams,* (Nebr., 1884) 5 S. Ct., 41, 112 U. S., 101, 28 L. Ed., 643;
> *Owensboro Waterworks Co. v. Owensboro, Ky.,* (1906) 26 S. Ct., 249, 200 U. S., 38, 50 L. Ed., 361.

(D) The issuance of warrant as "ministerial act," without judicial scrutiny, upon the filing of a sworn accusation, makes the "security" guaranteed by the 4th and 14th Amendments a hollow mockery, puts all power in accuser to deprive his neighbor of liberty by arbitrary arrest, reduces the machinery of law to acting as the tool and obedient servant of the accuser. We respectfully insist this is not "security against unreasonable * * * seizure," nor "due process."

II.

REPLY TO RESPONDENT'S SECOND ANSWER.

(A) Respondent maintains petitioners have adequate remedy at law by appeal, which precludes them from resorting to habeas corpus.

That position necessarily assumes that the Municipal Court acquired jurisdiction of these petitioners' persons in spite of unlawful issuance of warrant. How did it acquire it? Respondent mentions Focke's motion in Municipal Court to quash, which was overruled. But Focke expressly appeared only for the purpose of disputing jurisdiction of that court over his person for lack of due process. Such

motion expressly for only such purpose does not enter general appearance, provided no dispute is made on the merits of the case. Ohio law is settled on that:

27 *Ohio Juris,* p. 767, Motions & Orders, Sec. 13;
2 *Ohio Juris.* 2d, pp. 507 et seq., Appearances, Secs. 10, 20;
Smith v. Hoover, 39 Ohio St., 249, syl. 3;
Elliott v. Lawhead, 43 Ohio St., 171, 1 N. E., 575, syl. 5;
Greene v. Woodland Ave. etc. St. Ry. Co., 62 Ohio St., 67, syl. 2;
Hayes v. Kentucky Joint St. etc. Bank, 125 Ohio St., 359;
Maloney v. Callahan, 127 Ohio St., 387, 188 N. E., 656.

Respondent cites a former case, *State, ex rel. Focke, v. Kirkpatrick, Chief, etc.,* No. 2317, Court of Appeals, which concerned a former arrest, filed the previous year in Municipal Court of Dayton for a similar alleged misdemeanor. Focke combated that charge first by motion to quash for lack of jurisdiction by the Municipal Court of his person, and next by petition to the Court of Appeals for habeas corpus. The Court of Appeals sustained respondent's motion to dismiss in that case, in an opinion filed therein January 26, 1955, for the reason he had included in his grounds a contention that the city income tax ordinance was unconstitutional and void; which was ruled to be improper for habeas corpus, citing *Yutze v. Copelan,* supra, et al. (That former case is now pending in the Common proper for habeas corpus, citing *Yutze v. Copelan, et al.,* supra. (That former case is now pending in the Common Pleas Court of Montgomery county.) In the case now at bar, however, Focke confined his grounds for habeas corpus exclusively to the unlawful issuance of warrant. The Court of Appeals' denial of respondent's motion this time

marks the difference as to Focke's "appearance" in Municipal Court.

But Creager never appeared for any purpose in Municipal Court but petitioned at once the Court of Appeals for habeas corpus, basing it exclusively on lack of jurisdiction of his person because of unlawful issuance of warrant.

Where and how, then, could these petitioners, or either of them, be ruled to have adequate remedy at law by appeal? Neither has forfeited his privilege of habeas corpus. To deny them that privilege is to "suspend the writ," in contravention of Art. I, Sec. 8, Ohio Constitution, and of Ohio Revised Code Sec. 2725.01-.06. It deprives them of liberty without due process of law.

Respectfully submitted,

JOSEPH W. SHARTS,
527 W. Second St., Dayton 2, Ohio,
Counsel for Petitioners.